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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 876

In the Matter of the Petition
of
WILLS LINES, INC.,
for exemption from, or limitation of, liability,
Petitioner,

TANKPORT TERMINALS, INC.,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
to
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion/Order of District Court, Denying Leave to Surrender Vessel to Trustee.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Admiralty A 177-223

In the Matter of the Petition

of

WILLS LINES, INC.

for exoneration of, or limitation of, liability.

NOONAN, D. J.:

This is a motion for leave to amend the petition in this proceeding, and for an order appointing a Trustee to take title to the motor-vessel involved pending the ultimate determination of this proceeding, in lieu of an ad interim stipulation now on file, and permitting the petitioner to withdraw that stipulation.

In short, what the petitioner is seeking is leave to substitute surrender of the vessel and her freight for the ad interim stipulation previously filed. The question presented is whether by filing the order for the ad interim stipulation and the stipulation for value the petitioner has irrevocably elected this form of limitation of liability.

The claimant relies on the doctrine of the case of the *Ontario No. 1*, 80 F. 2d 85, as authority for precluding the substitution. We agree.

The order for monition, the monition and a restraining order have already been procured by the petitioner. It has reaped all the benefits of this form of relief and must abide by its election.

The motion is accordingly denied. So ordered.

Dated: New York, N. Y., September 29, 1953.

/s/ GREGORY F. NOONAN,
U. S. D. J.

Order, Summarily Affirming the Opinion.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
ALEXANDER M. BELL, Clerk — Foley Square, New York 7

"STAY DENIED H. B. C. C. E. C. J. N. F. U. S. C. JJ." October 8, 1953

On motion for order summarily affirming—"order affirmed on authority of the Ontario 2nd Cir. 80 F (2nd) 85

HBC
CEC
JNF C. JJ."

Order, Denying Motion to Recall Reference.

Petitioner, having moved by order to show cause signed by Honorable Henry W. Goddard dated November 4, 1953, for an order to vacate the order of appraisal herein and to have the matter referred returned to this Court for hearing and adjudication by this Court, and said motion having come on to be heard on the 5th day of November, 1953, before Honorable Henry W. Goddard, and said motion having been respectfully referred to Judge Clancy,

Now, upon reading and filing the order to show cause signed by Honorable Henry W. Goddard, U. S. D. J., on November 4, 1953, and the affidavit of Harry D. Graham sworn to November 3, 1953, and Harry D. Graham, proctor for petitioner, having appeared in support of said motion, and Krisel, Beck & Taylor, by Max Taylor, proctors for claimant, Tankport Terminals, Inc., having appeared in opposition thereto, and the Court after due deliberation thereon having denied said motion and vacated the stay contained in said order to show cause,

Now, upon motion of Krisel, Beck & Taylor, proctors for claimant, Tankport Terminals, Inc., it is

ORDERED, that said motion be and the same is hereby denied, and it is further

ORDERED, that the stay contained in the show cause order signed by Honorable Henry W. Goddard, U. S. D. J., on November 4, 1953, be and the same is hereby vacated.

Dated: New York, N. Y., November 16, 1953.

JOHN W. CLANCY,
U. S. D. J.

Filed November 16, 1953.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 101—October Term, 1957.

(Argued November 21, 1957 Decided January 8, 1958.)

Docket No. 24745

In the Matter of the Petition

—of—

WILLS LINES, INC.,

for exemption from, or limitation of, liability,

Petitioner-Appellant-Cross-Appellee,

TANKPORT TERMINALS, INC.,

Claimant-Appellee-Cross-Appellant.

Before:

HAND, HINCKS and LUMBARD,

Circuit Judges.

Appeal from an interlocutory decree in a limitation proceeding in admiralty, entered in the United States District Court for the Southern District of New York, Edward L. Palmieri, *Judge*, which also presents for review cross-appeals from an interlocutory order entered by Judge Ryan in 1955. See 227 F. 2d 509. Affirmed except as modified.

HARRY D. GRAHAM, New York, N. Y., *for petitioner-appellant-cross-appellee.*

MAX TAYLOR, New York, N. Y. (Krisel, Beck & Taylor, New York, N. Y., on the brief), *for claimant-appellee-cross-appellant.*

HINCKS, *Circuit Judge*:

This case presents for our consideration cross-appeals from an interlocutory order in admiralty entered in 1955 by Judge Ryan as well as an appeal by petitioner, Wills Lines, Inc., from an interlocutory decree on the merits entered by Judge Palmieri. This litigation has arisen out of limitation of liability proceedings commenced by the petitioner.

The claimant, Tankport Terminals, Inc., appeals from so much of Judge Ryan's order as denied it a decree *pro confesso*. Petitioner appeals from so much of Judge Ryan's order as refused petitioner a limitation of liability. Petitioner also appeals from the decree of Judge Palmieri which (1) found petitioner solely liable for the damage suffered by claimant; (2) ordered a reference to ascertain claimant's damages; (3) awarded claimant interest for the period of approximately two years, throughout which an appeal from Judge Ryan's order, which had been instituted by the claimant, had been pending. See *In re Wills Lines*, 2 Cir., 227 F. 2d 509, cert. den. and leave to file petition for mandamus denied on April 30, 1956, 351 U. S. 917.

The S.S. Mayfair was a ferry owned by petitioner and used to transport sight-seers between the Battery and the Statue of Liberty on Bedloe's Island. On January 15, 1953, the Mayfair was enveloped by fog as it prepared to leave Bedloe's Island on its normal 3:30 p. m. trip. The fog remained dense until shortly before 8:00 p. m., when the wind

shifted and visibility increased. The captain of the Mayfair immediately set out for the Battery, carrying 61 passengers who had been stranded on the Island. The ship had just commenced to gain headway and was 150 feet from its starting point when the fog suddenly again shut in and visibility was reduced to zero. Lookouts were posted and the Mayfair's fog whistle was sounded at one minute intervals in conformance with proper procedure.

Approximately ten minutes later the Mayfair collided with the claimant's dock coming upon it with considerable force bow on, at right angles. The dock was a narrow structure, resembling a trestle, running approximately one mile from the Jersey shore into New York Harbor to a point about 1,000 feet southwest of Bedloe's Island. No part of it jutted out into the navigable channel: for 750 feet it ran parallel to, and formed the boundary of, the so-called northwest channel. It had no audible signal devices. It is agreed that its three red navigation lights were not visible through the fog. Since the dock was used as a fueling station for ships there were floodlights on the dock for use in night loading. At no time before the incident were these lights turned on.

The normal courses of the Mayfair on a return trip were southwest in Bedloe's Island channel approximately 500 feet, thence southeast in the so-called northwest channel and parallel to the claimant's dock and beyond to the main channel of New York Harbor, and thence in the main channel northeast to the Battery. Two buoys marked the intersection of the Bedloe's channel and the northwest channel but neither offered any aid to navigation in fog.

On March 31, 1953, petitioner filed an *ex parte* petition for limitation of liability. The petition was granted and an order was filed pursuant to which a stipulation and *ad interim* bond for $15,000 in the usual form were filed. An

order was also entered which restrained the commencement of other suits.

The claimant disputed the Mayfair's value and a reference was ordered. The Commissioner found the Mayfair's value to be $30,000. Both parties filed exceptions but the Commissioner's report was confirmed. The claimant then moved for an order requiring petitioner to increase its *ad interim* stipulation. This order was issued but petitioner refused to comply. The claimant then moved before Judge Ryan for a decree *pro confesso*. Judge Ryan ruled that the default was not "so wilful" as to warrant a decree *pro confesso*. Instead, he granted claimant the right to prosecute its claim by libel in a new action or in the pending limitation proceeding. Also, Judge Ryan ordered that petitioner be denied a limitation of liability and that the restraining order be vacated.

Petitioner's explanation for not meeting the increased stipulation was that petitioner was unable to raise any further funds on the Mayfair. But that certainly does not indicate that the ship was worth no more than $15,000. We hold that Judge Ryan's order, in so far as it denied petitioner limited liability, was proper: petitioner failed to abide by an admiralty procedure it had chosen. See Rules 51 and 52 of the Rules of Admiralty Practice, 28 U. S. C. A. In view of the conflicting evidence presented to the Commissioner, we find nothing to warrant reversal of the $30,000 valuation.

The claimant contends that we should reverse Judge Ryan's refusal to grant claimant a decree *pro confesso* and should order such a decree. This would make it unnecessary for us to consider the claim on its merits. As to the petition for a decree *pro confesso* we think it clear that an admiralty court has the power to enter such a decree under the present circumstances. *The Greyhound*, 2 Cir., 68 F. 2d 832; *The Fred M. Lawrence*, 88 Fed. 910 (E. D. N. Y.), aff'd

94 Fed. 1017; *The Stella R*, 1 F. Supp. 998 (S. D. N. Y.). But even so we are reluctant to say that Judge Ryan's refusal to grant the decree *pro confesso* was an abuse of discretion and a definitive disposition of that question is unnecessary because we are satisfied that on the merits the claimant is entitled to prevail as we shall now proceed to show.

At the hearing before Judge Palmieri most of the evidence related to what happened during the 10 or 15 minute interval between the time the fog returned and the Mayfair's collision with the claimant's dock. The petitioner contended that the Mayfair had turned off its engines and had drifted into the dock. It asserted that claimant was liable for not having answered the Mayfair's fog signals and also because it failed to turn on its floodlights. The claimant introduced evidence showing that the current was running in a northeasterly direction—from the dock toward Bedloe's Island. The current and the physical incidents of the collision support the finding that the Mayfair did not drift into the dock.

Judge Palmieri found that the Mayfair was under some power at the time of the impact and under the circumstances was at fault on that account. He noted that even if the facts were otherwise and the collision were attributable to drift, the Mayfair was at fault for failure to ascertain and counteract the drift by lead line and anchor. The evidence was such that Judge Palmieri's findings were not clearly erroneous. Fed. Rules Civ. Proc., Rule 52(a). And the conclusion of negligence based upon the findings was right. This case is quite similar to *Pennsylvania R. Co.* v. *Central R.R. of New Jersey*, 103 F. 2d 428, cert. den. 308 U. S. 591, where this court held that a ferry moving in fog was solely liable for hitting a stationary barge anchored at the end of a pier and, also, that the barge had no duty of returning audible signals to the ferry.

Petitioner relies essentially upon *Erie & Western Transp. Co.* v. *City of Chicago*, 7 Cir., 178 Fed. 42. However, that case is distinguishable in two important respects. There, the dock projected directly into the navigable channel: in our case claimant's dock is merely a boundary of the channel and at no point juts into the channel. Secondly, in the *Erie* case an audible fog signal had previously been mounted on the dock but the bell had been removed from its moorings prior to the night of the collision. In the instant case claimant's dock, as the Mayfair's master undoubtedly knew, has never been supplied with audible signals, the silence of which might have misled the master. And we know of no rule of law that the claimant was under a duty to keep its dock illuminated by its loading lights. The petitioner's contention that claimant's dock constituted a menace to navigation is utterly lacking in support in the record.

Although the issue of damages in this case does not appear to be overly complex, we cannot say that the court below abused its discretion in ordering a reference of the issue especially in view of the recognized admiralty practice. It is significant that the Admiralty Rules contain no counterpart of F. R. C. P. 53(b). Since the interlocutory decree contains no provision dealing with questions relating to the measure or the amount of damages, such questions are not reviewable at this stage.

The petitioner further urges that it should not pay interest for the period covered by the pendency of claimant's unsuccessful appeal from Judge Ryan's order. This contention we sustain. Although the award of interest is generally within the discretion of the trial court, *O'Donnell Transp. Co.* v. *City of New York*, 2 Cir., 215 F. 2d 92, a long delay in pressing for trial may affect that discretion. *The Wright*, 2 Cir., 109 F. 2d 699. Here, the claimant sought to appeal in this court from an order which was plainly unappealable.

227 F. 2d 509. It also sought, but to no avail, certiorari and mandamus in the Supreme Court. 351 U. S. 917. The cross-appeals taken by the petitioner were plainly protective; and since, if the claimant had prevailed on its appeal, there would have been no trial, the petitioner cannot justly be charged with dilatory conduct in failing, during the pendency of the appeal, to press for trial below. Under these circumstances we hold that the trial court should not have allowed interest for the period from January 25, 1955, when the appeal was filed, until April 30, 1956, when the Supreme Court refused to hear the case. Since the order appealed from provided for interest and the petitioner, on trial, admitted that the collision resulted in "some damage," we have jurisdiction under 28 U. S. C. A. §1292(3) to make this ruling at this stage.

Affirmed, except as modified with respect to the allowable interest.

Statutes Involved.

LIMITATION OF VESSEL OWNER'S LIABILITY (pertinent sections)

"*46 U. S. C. A. Sec. 183(a), as amended.* The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done occasioned, or incurred, without the privity or knowledge of such owner or owners shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

"*46 U. S. C. A. Sec. 185, as amended.* The vessel owner within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall post with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

Statutes Involved.

"*28 U. S. C. A. Supreme Court Admiralty Rule 51—Limitation of liability—how claimed* (portions not relevant to the issue and questions are omitted). The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled 'An Act to limit the liability of shipowners and for other purposes' (Sections 183 to 189 of Title 46 of the U. S. Code, 46 U. S. C. A. Secs. 183-189) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; * * * the value of the vessel at the close of the voyage * * * and the amount of any pending freight recovered or recoverable. * * * With his petition the petitioner may, if he so elects, file an ad interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage * * * and any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation and costs.

If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to the value of the vessel, * * * and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, * * * and her freight shall make an order for the payment of the same into court, or for the giv-

ing of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel * * * and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon * * *; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, *or* upon determination of value by appraisal and compliance with the court's order with respect thereto, *or* upon compliance with a surrender order, as the case may be, the Court shall issue a monition, (etc.) * * *"

"*28 U. S. C. A. Supreme Court Admiralty Rule 52*

"* * *

Whenever an interim stipulation has been filed as provided in Rule 51, any person claiming damages as aforesaid, who shall have filed his claim under oath, may file an exception controverting the value of the vessel at the close of the voyage * * * and the amount of her pending freight and the amount of the interim stipulation based thereon, and thereupon the court shall cause due appraisement to be had of the value of petitioner's interest in the vessel * * * and her freight; * * *"

Statutes Involved.

"28 U. S. C. A. Supreme Court Admiralty Rule 46—Evidence—how taken.

"In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties. * * *"

"28 U. S. C. A. Supreme Court Admiralty Rule 43—Reference to commissioners.

In cases where the court shall deem it expedient or necessary for the purposes of justice, it may refer any matters arising in the progress of the suit to one or two commissioners or assessors, to be appointed by the court, to hear the parties and make a report therein. And such commissioners or assessors shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises."

"28 U. S. C. A. Federal Rules of Civil Procedure, Rule 53(b)—Masters.

(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."